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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

JOSEPH A. REILLY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an appellate court, finding no evidence to support the conspiracy upon which the jury convicted, could nonetheless sustain a conviction based upon its conclusion that the defendant was guilty of a different conspiracy which was not the basis of the jury's decision.

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PETITION FOR A WRIT OF CERTIORARI

Joseph A. Reilly respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at *United States v. Coy*, 19 F.3d 629 (11th Cir. 1994) and is included at App. 1a-18a [1]. The opinions of the district

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[1] References to the Appendix to this Petition are referred to as "App.," followed by the page number.

court are unreported. Petitioner's judgment of conviction is included at App. 19a-20a. Excerpts from the transcript of Petitioner's sentencing proceeding are included at App. 21a-28a.

JURISDICTION

The court of appeals entered its judgment on April 27, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A federal grand jury indicted Petitioner in the United States District Court for the Middle District of Florida on four counts for participating in a single conspiracy to import marijuana into the United States and to possess marijuana with the intent to distribute. The jury convicted Petitioner on all four counts, and he appealed to the United States Court of Appeals for the Eleventh Circuit. The appellate court, although finding that the evidence did not reasonably show Petitioner to have participated in the conspiracy charged in the indictment or described by the prosecution, nonetheless affirmed his conspiracy convictions.

A. Background Facts

This case involves two fishing vessels, the "Duke" and the "Dan's Plan", and an unusual event in the Gulf of Mexico. Petitioner captained the "Dan's Plan". App. 2a; R.6-193.[2] Sometime in the spring of 1987, the "Dan's Plan" sailed out of Madeira Beach on Florida's central gulf coast for a commercial fishing expedition. The "Duke" sailed out of Madeira Beach the following day. The vessels were on separate fishing trips. The two ves-

[2] References to the record on appeal are for the Court's convenience should it wish to review the record. All references to the record are referred to as "R.", followed by the appropriate citation to the volume and the page number.

sels did not encounter each other until several days into their trips when the "Dan's Plan" transferred fuel to the "Duke." R.6-250. After the fuel transfer, the vessels resumed fishing within a short distance of each other by laying out their fishing lines. App. 2a.

Shortly after the fuel transfer, a small commuter plane appeared, flying at a low altitude, pursued by a United States Customs plane. App. 3a. The commuter plane began dropping bales of marijuana into the water. App. 3a; R.5-160. The appearance of the airplane and its marijuana cargo was a surprise to the crew members on both vessels, R.5-34, 35; R.6-250, and no one was expecting the plane. When the plane began dropping bales, however, both vessels ceased their fishing activity. App. 3a. Without communicating with each other or coordinating their activities, both crews began retrieving the bales that were closest to their respective vessels. App. 3a.

Shortly thereafter, the "Dan's Plan" headed for Madeira Beach, arriving early the following morning. App. 3a. The "Duke" arrived in Madeira Beach later that day. App. 3a. The marijuana pulled from the water by the "Dan's Plan" was loaded into a vehicle owned by John Albee and taken to Albee's house for storage. App. 3a; R.7-139. About one week later, while the marijuana was stored at Albee's house, Terry Dinninger contacted an acquaintance in Michigan to whom the marijuana was ultimately sold. App. 4a; R.7-153.

The marijuana retrieved by the "Duke" went to a different destination. The "Duke's' crew unloaded the marijuana retrieved by that vessel into a jeep owned by Mary Sue Coy. App. 4a. The marijuana was taken to the home of Coy and Ray Kothe, the captain of the "Duke", for storage. App. 4a. Wade Tappan then bought some of the marijuana from Kothe. App. 4a; R.8-98. Tappan,

with assistance from Kothe and Robert Laucius, sold the remainder to Jess Jones. R.8-107.

B. Proceedings Below

On November 6, 1991, a federal grand jury in Tampa, Florida, by superseding indictment, indicted Petitioner, Coy, Kothe and Daniel Heaton, the owner of both vessels, for violations of 21 U.S.C. § 963, conspiracy to import marijuana into the United States (count one); 21 U.S.C. § 952, importing marijuana into the United States (count two); 21 U.S.C. § 846, conspiracy to possess with intent to distribute marijuana (count three); and 21 U.S.C. § 841(a), possession with intent to distribute marijuana (count four).[3] *See* App. 29a-32a. The district court's jurisdiction was invoked pursuant to 18 U.S.C. § 3231, which provides for exclusive federal court jurisdiction over all offenses against the laws of the United States.

Petitioner and his co-defendants were tried by jury in the United States District Court for the Middle District of Florida. The heart of the government's case and the focus of the indictment was the existence of a single overall conspiracy among the crew members of the "Duke" and the "Dan's Plan" to rendezvous with the commuter plane, to retrieve its marijuana cargo and to bring it ashore for sale.[4] To prove this scheme, the gov-

[3] Throughout this case Petitioner has been represented by appointed counsel pursuant to the Criminal Justice Act. The district court appointed Michael DeMenico as counsel to represent Petitioner at trial. On his appeal, the district court appointed new counsel, Javier M. Guzman, who also represents Petitioner on this Petition.

[4] *See e.g.*, Count One of the Superseding Indictment (charging Petitioner and his codefendants with "knowingly and intentionally combin[ing], conspir[ing], confederat[ing], and agree[ing] with each other and with other persons, known and unknown to the Grand Jury, to import into the United States from a place outside thereof marijuana."). App. 29a; R.1-101.

ernment attempted to show that the two vessels had coordinated their activities in arranging for the marijuana drop, had remained in constant communication with each other during the drop, and that crew members from the "Dan's Plan" had assisted in unloading marijuana from the "Duke."

However, the evidence showed that the incident was anything but a single integrated plan. Each vessel had laid out several miles of fishing line when the commuter plane appeared. Indeed, the vessels' fishing trip had been delayed by four days because of the storm which forced them to seek shelter at Fort Jefferson, off the southwest coast of Florida. App. 2a. During the fuel transfer, none of the crew members discussed or heard conversations about marijuana. No witness at the trial testified that the two vessels were communicating with each other during the marijuana drop or retrieval.[5] The government also

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[5] The government asserted in its initial brief to the appellate court that Curtis Johnson, a crew member on the "Duke" had testified that Kothe had radioed the "Dan's Plan" during the marijuana drop. This assertion is incorrect as demonstrated by the following exchange between Johnson and Dennis Moore, the prosecutor.

> Q: (By Moore) Okay. And were you able to hear at that particular time or any time thereafter, any communications between the "Dan's Plan"—radio communications between the "Dan's Plan" or the "Duke"?
>
> A: (By Johnson) Yes, sir.
>
> Q: What did you hear?
>
> A: I heard Baby Ray [Kothe] on the radio *and I didn't hear him mention no names, nothing, but he said "flying duck."*
>
> Q: And when did this conversation take place in relationship to the bales being dropped out of the plane?
>
> A: Right as the plane passed the boat.
>
> Q: That's when you heard that particular conversation?
>
> A: Yes, sir.
>
> Q: Okay. And after Baby Ray made that comment, what did the vessel, the "Duke", do next?
>
> A: *He carried a conversation on but I couldn't hear it.* He was still on the radio for a minute or so. And I was on the

failed to show that the crew members of both vessels assisted each other in unloading the marijuana cargo.[6]

At the close of trial, the district court, cognizant of the government's single conspiracy theory and of Petitioner's evidence directly rebutting the existence of any single conspiracy, instructed the jury that

> [i]f you find that no such conspiracy existed, then you must acquit the defendants of that charge. However, if you decide that this conspiracy did exist, you must then determine who the members were; and, if you should find any particular defendant was a member of some other conspiracy, but not the one charged in this indictment, then you must find the defendant not guilty. In other words, to find a defendant guilty you must unanimously find if he or she was a member of the conspiracy charged in *this* indictment here before you, and not a member of some other separate conspiracy.

App. 33a; R.1-162-13 (emphasis in original).

The jury convicted Petitioner on all four counts. App. 5a. The district court sentenced Petitioner to terms of imprisonment of five years as to counts one and two, to run concurrently, and five years as to counts three and

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> back deck; the whole crew was on the deck. So I went to the back of the boat.

R.5-133 (emphasis added).

[6] The government in its initial brief incorrectly asserted that Jarrett Lundgren, a crew member of the "Dan's Plan" helped unload marijuana from the "Duke". The evidence at most shows that a "Dan's Plan" crew member merely watched the unloading of the "Duke":

> Q: (By Moore) And did you take any action with respect to the "Duke" when it came in? Did you assist anyone on the "Duke"?
>
> A: (By Lundgren) *I didn't help unload or nothing.* I sat there and watched. I was on the front of the Jeep there.

R.6-226, 227 (emphasis added).

four, to run concurrently with each other, but consecutive with the sentences imposed on counts one and two. App. 4a, 27a-28a.[7] The court based these sentences on the amount of marijuana retrieved by both vessels because the jury's verdict was, at the government's urging, based on the existence of a single conspiracy among the defendants. The court stated that "[the] jury's finding that a single conspiracy charged in the indictment was proved should be disturbed only if the evidence viewed in the light most favorable to the government would not permit reasonable jurors to find beyond a reasonable doubt that there was a single conspiracy." App. 21a-22a; R.11-17.

Pursuant to 28 U.S.C. § 1291(a), Petitioner appealed his conspiracy convictions and sentence to the United States Court of Appeals for the Eleventh Circuit, arguing, among other grounds, that he had been erroneously convicted because the evidence did not show beyond a reasonable doubt that he had participated in the single conspiracy charged by the government.[8] The appellate

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[7] Presently, Petitioner is to be resentenced based on the amount of marijuana pulled from the water by the "Dan's Plan". If Petitioner's conspiracy convictions are reversed, the convictions for the underlying substantive offenses of importation and possession will remain. This reduction in Petitioner's culpability and the smaller amount of marijuana involved could form the basis for the district court to reduce the imprisonment term of Petitioner on resentencing.

[8] The government also attempted to appeal Petitioner's sentence, arguing that the district court had erroneously refused to sentence Petitioner under the mandatory minimum sentencing provisions of 21 U.S.C. §§ 841(b)(1)(A)(vii) and 960(b)(1)(G). The government argued that these provisions were triggered by the amount of marijuana retrieved by both vessels. The district court did not impose any mandatory minimum sentence on the defendants because the government had not formally notified them before trial of that possibility. R.11-20. The court of appeals found that no statute gave the government authority to appeal Petitioner's sentence and proceeded to treat the government's appeal as a petition for writ of mandamus. The court then granted the government mandamus relief on the basis that it did not have to give pretrial notice to

court agreed with Petitioner, concluding that no reasonable jury could have determined beyond a reasonable doubt that a single conspiracy existed. App. 7a-8a. The court vacated Petitioner's sentence but nonetheless affirmed his conspiracy convictions, finding that "his substantial rights were not prejudiced by this variance." App. 8a. According to the court, Petitioner was not prejudiced because (1) he was not unfairly surprised at trial—the crimes that the indictment charged and the crimes that the separate conspirators committed were identical; and (2) because only two conspiracies existed and only three defendants were tried together,[9] this case was sufficiently simple to permit the jury to sift through the evidence and to treat each defendant separately. App. 11a. The court's opinion ignored the specific instruction to the jury that it was to acquit Petitioner if the evidence could not show beyond a reasonable doubt that he was part of the single overall conspiracy charged in the indictment. Based on the appellate court's opinion, the issue confronting this Court is whether, upon finding that Petitioner did not participate in the charged conspiracy, his conviction should have been reversed, consistent with the instructions provided to the jury.

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the defendants that they could be subject to enhanced sentences if convicted. In vacating Petitioner's sentence, the appellate court remanded the case to the district court to determine the amount of marijuana attributable to Petitioner in light of the fact that no single conspiracy existed. Petitioner's resentencing hearing is presently pending and no hearing date has been set.

[9] Due to medical problems, Kothe was tried separately. App. 2a.

REASONS FOR GRANTING THE PETITION

The appellate court, in affirming Petitioner's conspiracy convictions, improperly revised the basis of Petitioner's conviction to one based on multiple conspiracies; a basis not found in the indictment or presented at trial. This case is not one of variance between the indictment's allegations and the evidence. Rather, this case is about tethering the appellate court's review of a conviction to the basis of the jury's decision. Therefore, the framework of analyzing a variance to determine if it prejudiced the defendant is inapplicable. By revising the basis of his conviction, the appellate court denied Petitioner his due process right to confront the government's case. Essentially, the appellate court improperly assumed the jury's role and retried Petitioner on a multiple conspiracy theory, without providing Petitioner with the opportunity to defend against this theory.

The appellate court's creation of a discrepancy between the jury's theory of conviction and the appellate theory conflicts with the First Circuit's decision that a conviction must be reversed when it is not based on the indictment's allegations or the government's theory at trial. These two decisions represent irreconcilable views of the same issue: the appellate treatment of a conviction which is not supported by the government's theory of guilt or in the indictment.

I. THE DECISION BELOW IS ERRONEOUS BECAUSE THE APPELLATE COURT SUSTAINED THE CONVICTION ON THE BASIS THAT PETITIONER WAS GUILTY OF A DIFFERENT CONSPIRACY WHICH WAS NOT THE BASIS OF THE JURY'S DECISION.

"This Court has never held that the right to a jury trial is satisfied when an appellate court retries a case on appeal under different instructions and on a different theory than was ever presented to the jury." *McCormick v. United States*, —— U.S. ——, 113 S. Ct. 1807, 1815

n.8 (1991); *see also Chiarella v. United States*, 442 U.S. 222, 237 (1980) (holding that on appeal, a conviction cannot be sustained on a theory upon which the jury was not instructed); *Dunn v. United States*, 442 U.S. 100, 107 ("appellate courts are not free to revise the basis on which a defendant is convicted simply because the same result would likely obtain on retrial."); *United States v. Egan*, 860 F.2d 904, 909 n.2 (9th Cir. 1988) (preventing the government from attempting to sustain a conviction on a theory that they used neither in the complaint nor in argument before the jury); *United States v. Hill*, 835 F.2d 759, 764 n.7 (10th Cir. 1987) (appellate court will not sustain a conviction on a theory upon which the jury was not instructed); *Cola v. Reardon*, 787 F.2d 681, 696 (1st Cir.), *cert. denied*, 479 U.S. 930 (1986) (government's theory of conviction on appeal must be set forth in both the indictment and the case presented the jury).

From the outset, the government has framed its case against Petitioner as a single overall conspiracy among the defendants. It obtained an indictment from the grand jury against Petitioner and his co-defendants alleging that they participated in a single conspiracy. It sought to prove this single conspiracy by presenting to the jury putative facts that the two vessels intended to rendezvous with the airplane and coordinated their recovery of the marijuana bales. It did not object to the court instructing the jury to convict Petitioner only if it found him to have participated in the charged conspiracy. It sought and received a finding from the court that the amount of marijuana to be considered in sentencing Petitioner was the combined amount retrieved by both vessels. It argued on appeal that the evidence sufficiently demonstrated a single conspiracy between Petitioner and his co-defendants.[10] Nevertheless, the appellate court, improperly

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[10] Even if the government had argued a theory of multiple conspiracies to the jury, the district court did not instruct the jury

disregarded the substance of the indictment and the government theory at trial and affirmed Petitioner's convictions while simultaneously acknowledging that no single conspiracy existed. "Appellate courts are not free to affirm convictions on any theory they please simply because the facts necessary to support the theory were presented to the jury." *McCormick*, 111 S. Ct. at 1815 n.8. For this reason Petitioner's conspiracy convictions must be reversed.

In *McCormick*, the defendant, a West Virginia state legislator, was indicted for extorting cash payments in violation of the Hobbs Act. The defendant had accepted two cash contributions from a doctors' organization interested in the passage of a bill. At the close of trial, the district court instructed the jury that to establish a Hobbs Act violation, the government had to prove that the defendant had induced a cash payment by extortion. The jury convicted the defendant on that basis.

On appeal, the appellate court found that as a matter of law the Hobbs Act is not violated when a legislator receives voluntary campaign contributions. *McCormick*, 111 S. Ct. at 1812. However, the appellate court then interpreted the act to bar payments that are never intended as campaign contributions. *Id.* On this basis, the court found that evidence existed which would permit a reasonable jury to conclude that the contributions to the defendant were never intended to be campaign contributions. *Id.*

This Court reversed the defendant's conviction partly on the basis that the appellate court's theory of conviction was never presented to the jury. *Id.* at 1815 n.8. Once the court found a new basis to convict the defendant, it

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that it could convict Petitioner upon finding that he was part of such a conspiracy. To affirm Peitioner's conspiracy convictions on that basis would have required the appellate court to improperly speculate upon what inferences the jury might have drawn. *See Hill*, 835 F.2d at 764 n.7; *Cola*, 787 F.2d at 697.

was not free to affirm the conviction on that basis. *Id.* To permit the appellate court to retry the case on appeal would deprive the defendant of his right to a jury trial. *Id.*

As stated in *McCormick*, the proscription on an appellate court superimposing its view of the evidence at trial or conjecturing as to the jury's verdict on retrial is firmly rooted in the due process rights afforded a criminal defendant. The defendant has the right to a jury trial in which he is able to confront the government's case. *Cola*, 787 F.2d at 681 (citing and quoting *Jackson v. Virginia*, 443 U.S. 307, 314 (1979) ("It is axiomatic that a conviction upon a charge not made *or* upon a charge not tried constitutes a denial of due process.") (emphasis in original)). This right provides the defendant with the opportunity to prepare his defense; and his guilt rests solely on the government's proof beyond a reasonable doubt of the facts alleged in the indictment.

The result of disregarding this right is readily apparent in the decision below. The government prosecuted Petitioner on the theory that he participated in a single overall conspiracy with his co-defendants to import and possess marijuana with the intent to distribute. Petitioner necessarily based his defense on the fact that no conspiracy as described by the government existed among the defendants, and this was the only basis upon which the trial court authorized a conviction. The appellate court (unlike the jury) agreed with Petitioner's defense to the conspiracy charges, yet affirmed Petitioner's conspiracy convictions on the theory that if the government had presented a case of multiple conspiracies, the jury would still have convicted Petitioner. This result violates the fundamental right of a criminal defendant to fully prepare a defense based on the indictment and the government's case presented at trial, and not on having to anticipate what alternative bases might sustain a conviction on appellate review. As it stands, the appellate court affirmed on the basis of a theory that, by virtue of the trial

court's instructions, could not have sustained a jury verdict.

Implicit in the appellate court's decision that Petitioner was not prejudiced by the variance between the indictment and the evidence is the conclusion that had the indictment charged Petitioner and his co-defendants with participating in separate conspiracies (one by the crew members of the "Duke" and one by the crew members of the "Dan's Plan") and the government had presented such a case at trial, then Petitioner would still have been convicted. However, this Court has held that such a likelihood is an insufficient basis for upholding a conviction on appeal. *Dunn v. United States*, 442 U.S. 100, 107 (1979). The appellate court can only consider as the proper basis for conviction the specific allegations of the indictment and the government's theory presented at trial. *Id.*; *see Cola*, 787 F.2d at 695-97.

In *Dunn*, the Court reversed an appellate decision affirming a defendant's convictions for making false declarations under oath before or ancillary to a grand jury proceeding. The defendant had testified before a grand jury about an individual, Musgrave's, various drug-related offenses. *Dunn*, 442 U.S. at 103. Subsequently, in an oral statement under oath given at his attorney's office, the defendant recanted his testimony. *Id.* Musgrave then moved to dismiss his indictment, alleging that it was based on perjured testimony. At an evidentiary hearing on the motion to dismiss, the defendant adopted his prior oral statement. *Id.* Subsequently, a grand jury indicted the defendant on the basis that his oral statement was a false statement made ancillary to a grand jury proceeding in violation of 18 U.S.C. § 1623, under the Organized Crime Control Act of 1970.

The district court instructed the jury to render its verdict on the oral statement as alleged in the indictment. The jury convicted the defendant and he appealed to the Tenth Circuit. Although the court of appeals agreed with

the defendant that his oral statement was not made ancillary to a grand jury proceeding and could not be the basis for conviction, it concluded that the adoption of his statement at the evidentiary hearing was such a proceeding and affirmed the defendant's conviction. *Id.* at 104-05.

This Court reversed, finding that there was a discrepancy between the basis on which the jury rendered its verdict and that on which the appellate court sustained the conviction. *Id.* at 106. Nor was the Court persuaded to affirm the conviction on the basis that the jury would have convicted the defendant if the government had correctly charged as perjury the adoption of the statement at the hearing "[t]here is, to be sure, no glaring distinction between the government's theory at trial and the [appellate court's analysis] on appeal . . . But the offense was not [accurately] defined, and appellate courts are not free to revise the basis on which a defendant is convicted simply because the same result would likely obtain on retrial." *Id.* at 107.

As did the appellate court in *Dunn*, the Eleventh Circuit revised the basis of Petitioner's conviction and rationalized that the jury would have convicted the defendant had the government presented the correct theory in the case and in the indictment. The district court had instructed the jury to render its verdict based on the single conspiracy charged in the indictment: "to find a defendant guilty you must unanimously find if he or she was a member of the conspiracy charged in *this* indictment here before you, and not a member of some other conspiracy." App. 33a. *See United States v. Blanco*, 861 F.2d 773, 782 (2d Cir. 1988), *cert. denied*, —— U.S. ——, 109 S. Ct. 139 (1989) (in discussing analogous instruction used in the Second Circuit, the court stated that "it is proper instruction in a prosecution charging existence of a conspiracy to stress that the jury may not convict unless there is a finding that the single conspiracy

charged existed, . . . and that proof of separate conspiracies is not sufficient[.]"). Upon finding that multiple conspiracies existed, the appellate court was compelled to reverse the conspiracy convictions instead of finding that, in the court's terms, "the variance did not prejudice the Petitioner's substantial rights."

The appellate court found that the evidence did not show that a single conspiracy existed as charged by the government. An identical finding by the jury would compel Petitioner's acquittal. Yet the appellate court, under its variance analysis, reached a decision that was foreclosed to the jury. The appellate court's decision is erroneous because it forces Petitioner to not only defend against the indictment and the government's case, but also to divine and defend against possible theories which the appellate court may employ on review outside the context of the jury's understanding and instructions.[11] Accordingly, the Court should grant this petition to correct the Eleventh Circuit's error.

II. THE ELEVENTH CIRCUIT'S DECISION AFFIRMING PETITIONER'S CONVICTION WHEN THE FACTS PROVED AT TRIAL ARE AT VARIANCE WITH THOSE ALLEGED IN THE INDICTMENT CONFLICTS WITH THE FIRST CIRCUIT'S DECISION THAT AN APPELLATE COURT CANNOT REVISE THE BASIS OF A CONVICTION.

The harmless variance analysis employed by the Eleventh Circuit originated in *Berger v. United States*, 295

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[11] In civil proceedings the Court has granted certiorari to review and enforce the integrity of the jury process, including its deliberations and instructions. *See e.g., Harris v. Pennsylvania R. Co.*, 361 U.S. 15 (1959) (granting certiorari to reinstate jury verdict in negligence case brought under Federal Employers' Liability Act ("FELA")); *Wilkerson v. McCarthy*, 336 U.S. 53 (1949) (granting certiorari because of importance of preserving for litigants under FELA their right to a jury trial). The Court's role as protector of the jury process is even more compelling in a criminal proceeding because the defendant is guaranteed the right to trial by jury.

U.S. 78 (1935), in which the Court held that a variance is fatal when the indictment charges one conspiracy and the evidence shows multiple conspiracies, and the defendant's rights have been substantially prejudiced. *Berger*, 295 U.S. at 81; *see also Kotteakos v. United States*, 328 U.S. 750, 757 (1946) (holding that a variance is not fatal unless it has "affect[ed] the substantial rights of the accused."). Indeed, the harmless variance analysis has been adopted in virtually all of the judicial circuits. But this case does not present an issue of variance between the indictment and the evidence.

Rather, this analysis has been found inapplicable in cases in which a discrepancy exists between the basis of the jury's verdict and the appellate court's basis for sustaining a conviction. In *Dunn v. United States, supra*, the Court reversed a conviction because the appellate court had revised the basis for the conviction on appeal. The Court did not use the harmless variance analysis because it found that the indictment was consistent with the government's theory at trial. Instead, the Court found the defendant's due process rights to have been violated because "there was a discrepancy between the basis on which the jury rendered its verdict and that on which the Court of Appeals sustained [defendant's] conviction." *Dunn*, 442 U.S. at 106.

Petitioner's case suffers from the same affliction. The government obtained a grand jury indictment of Petitioner based on his participation in a single conspiracy. Consistent with the indictment's allegations, the government argued the single conspiracy theory to the jury. Although the appellate court found that the evidence did not support the existence of a single conspiracy, the court affirmed Petitioner's conviction on a different basis, concluding that the evidence supported Petitioner's conviction on a multiple conspiracy theory. The problem in the court's analysis, however, is not that the proof failed to mirror the indictment but that the appellate court's basis for

sustaining the conviction failed to mirror the basis for the jury's verdict.

The First Circuit in *Cola v. Reardon*, 787 F.2d 681 (1st Cir.) *cert. denied*, 479 U.S. 930 (1986) recognized this distinction between an appellate court reviewing a conviction where the evidence differs from the facts alleged in the indictment and sustaining a conviction on a theory neither presented to the jury nor alleged in the indictment. The First Circuit in *Cola* granted habeas corpus to a prisoner whose conviction had been affirmed on a theory not presented to the jury or alleged in the indictment. The prisoner, Cola, an attorney employed with the state department of revenue, was indicted for two violations of Massachusetts' conflict of interest statute. *Cola*, 787 F.2d at 633. The indictment alleged and the government focused on two acts: (1) Cola's acceptance of a mortgage on the property of an individual, Rapp, who was delinquent on his state taxes; and (2) arranging a loan for Rapp through a third party for which Cola received a payback on the transaction. The jury convicted Cola on both counts based on the two transactions proved at trial.

Cola appealed his conviction. The appellate court found that neither transaction was a crime under the conflict of interest statute. However, the court found that Cola had violated the statute by acting in a dual capacity, representing the state and Rapp. The appellate court recognized that these illegal acts were neither specifically alleged in the indictment nor emphasized by the government during trial. *Id.* at 688. Nonetheless, the appellate court affirmed the defendant's conviction, concluding that the indictment, as narrowed by a bill of particulars, and the government's case at trial, as outlined in opening and closing arguments, sufficiently referenced these illegal acts.

After failing to obtain review in the Massachusetts Supreme Court, the defendant petitioned the federal district court for a writ of habeas corpus. The district court found

that the case presented to the jury did not focus on the conduct found by the appellate court to be criminal, but agreed with the appellate court that "ample evidence" had been presented at trial to support the appellate theory of conviction. *Id.* at 690. The defendant then appealed to the First Circuit.

Relying heavily on *Dunn*, the First Circuit granted Cola's habeas petition, finding that neither the indictment nor the government had focused on the dual capacity theory. Although the First Circuit conceded that evidence supporting Cola's conviction on that theory was before the jury, the court stated this evidence could not support the defendant's conviction. *Id.* at 693. The First Circuit instead reasoned that under *Dunn*, an appellate court could not uphold a conviction on a charge that was neither alleged in the indictment nor presented to the jury at trial.[12] *Id.* at 696-97.

More significantly, the First Circuit refused to consider Cola's case one of simple variance between the indictment and the evidence. The First Circuit distinguished cases of variance from cases such as Cola's and *Dunn*. *Id* at 701. The Court recognized that the use of variance and the constraining of appellate review to the jury's basis for conviction are both concerned with ensuring that the defendant has adequate notice of the charges against him. However, constraining an appellate court's review of a conviction ensures more than adequate notice. It also guarantees that the defendant will have been "presented with an opportunity to confront, in a fact-finding forum, the government's final theory of guilt" or indeed, "whether an opportunity has been provided to have guilt determined by the jury in the first instance." *Id.* In the end, a defendant should not have to divine the possible theories

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[12] The First Circuit found the requirement of both elements to be compelled by the "fundamental sixth amendment concern that guilt be initially adjudicated before a jury based on the government's case as presented at trial." *Id.* at 697. This aspect of the *Cola* decision is discussed in detail in Section I of the Petition.

upon which a conviction can be sustained in addition to preparing his defense against a very real indictment and the government's theory of guilt. For these reasons, the First Circuit expressed its "strong reservations against unquestioning application of the harmless variance doctrine." *Id.*

The perils which the First Circuit warned about in *Cola* are present in the Eleventh Circuit's decision affirming Petitioner's conviction. The indictment alleged and the district court instructed the jury on the basis of a single overall conspiracy among the defendants. The government espoused this theory on appeal in seeking to protect Petitioner's conviction and have his sentence increased to the mandatory minimum term. However, the Eleventh Circuit correctly concluded that the evidence showed no existence of a single overall conspiracy. More importantly, Petitioner never had the opportunity to defend against the appellate theory of conviction. The Eleventh Circuit's decision to essentially retry Petitioner on appeal conflicts with the First Circuit's view that a discrepancy cannot exist between the basis for a jury conviction and the appellate court's basis for affirming that conviction without depriving Petitioner of his right to confront the government's final theory of guilt. Based on the conflict between the First and Eleventh Circuits, the Court should grant this petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 92-2143

UNITED STATES OF AMERICA,
Plaintiff-Appellant,
Cross-Appellee,

v.

MARY SUE COY; JOSEPH REILLY; DANIEL HEATON,
Defendants-Appellees,
Cross-Appellants.

Appeals from the United States District Court
for the Middle District of Florida

April 27, 1994

Before KRAVITCH and COX, Circuit Judges, and HENDERSON, Senior Circuit Judge.

PER CURIAM:

The defendants were convicted of various crimes involving the importation and distribution of marijuana. On appeal, the defendants challenge their convictions. The Government challenges the defendants' sentences, contending that the district court erred in failing to impose relevant mandatory minimum sentences. We affirm the

convictions but vacate the sentences and remand for re-sentencing.

I. Facts and Procedural History

This case involves the tale of two fishing vessels (the *Duke* and the *Dan's Plan*) and an unusual event in the Gulf of Mexico. In 1987, both vessels fished out of the docks of Dick's Seafood in Madeira Beach, Florida. The *Duke* was owned by Mary Sue Coy and captained by Raymond "Baby Ray" Koethe.[1] The *Dan's Plan* was owned by Daniel Heaton and captained by Joseph Reilly.

In late February 1987, the *Duke* departed the docks of Dick's Seafood for a three-week fishing excursion in the Gulf of Mexico. During the trip, the weather started getting rough as a storm approached, so the crew anchored the vessel at Fort Jefferson in the Dry Tortugas to ride out the storm. Four days later, the storm passed and the *Duke* and crew returned to the Gulf to continue fishing.

Around noon the same day, the *Duke* rendezvoused with the *Dan's Plan* for a fuel transfer approximately thirty miles north of Fort Jefferson and sixty miles west of the Florida coast. The crews knew each other and the *Duke* needed additional fuel to continue its trip. The *Dan's Plan* had departed Madeira Beach a day earlier for a similar fishing excursion in the Gulf. After the transfer, the vessels parted a short distance to continue their quest for grouper.[2]

Both vesels laid out their fishing lines shortly after the fuel transfer. A crew member on the *Dan's Plan* saw a small twin engine airplane flying low above the water and being pursued by a U.S. Customs airplane.[3] The

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[1] Due to medical problems, Koethe was tried separately.

[2] Grouper is a delicious fish indigenous to the waters of the Gulf of Mexico.

[3] This was also witnessed by Larry Gardner, a Government witness who was fishing on a vessel within radio distance of the *Duke* and the *Dan's Plan*. (R.7 at 117).

planes were flying west and away from shore. About an hour later, both crews saw the small twin engine airplane returning east, flying just yards above the water. On board the *Duke,* a crew member heard Koethe radio "low flying duck" while a crew member on board the *Dan's Plan* heard Koethe radio "low flying bird."[4] The planed passed the *Dan's Plan* first and as it passed near the *Duke,* square bales started falling from its cargo doors into the waters of the Gulf below. The plane continued to dump the bales roughly in a line until it reached the horizon. The bales were tan and contained packages of marijuana.

Both crews ceased their fishing activity; Reilly on the *Dan's Plan* and Koethe on the *Duke* steered their vessels toward the line of bales. Both crews loaded several bales aboard their respective vessels but apparently without any coordination between the two crews. There were additional radio conversations between Koethe and Reilly after the drop, but none of the witnesses could testify as to what was said.

Shortly thereafter, both vessels headed for Dick's Seafood dock in Madeira Beach. The *Dan's Plan* arrived early the next morning before the *Duke.* Upon arrival, Reilly phoned Terry Dinninger, an acquaintance, to request his assistance in selling the marijuana. Dinninger in turned called John Albee. Soon thereafter a van arrived at the dock. The marijuana was then transferred from the vessel to the van. The van was owned by John Albee and the marijuana was taken to his house.

At Albee's house, the marijuana was dried, rewrapped, and packaged. The marijuana remained at Albee's house

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[4] Gardner testified to hearing Koethe say "low flying duck" also. (R.7 at 107). Gardner also testified that shortly thereafter, he heard someone say "it [is] raining square grouper" but could not identify the voice. (Id.). "Square grouper" is a slang term in the fishing business that means floating bales of marijuana. (R.7 at 134).

for nearly a week. During this time, Reilly and Heaton met with Dinninger to arrange for the distribution of the marijuana. The three agreed the marijuana would be sold to an acquaintance of Dinninger's in Michigan. It was also agreed each crew member and Albee would receive $10,000.00 for their participation in the venture.

The *Duke* arrived at Dick's Seafood dock later on the same day the *Dan's Plan* had arrived. Coy drove her Jeep to the dock and met the vessel upon its arrival. The *Duke*'s crew loaded the marijuana into Coy's Jeep. Coy, along with Koethe and *Duke* crew members, then drove it to a home shared by Coy and Koethe. Within the week, Koethe paid at least two of his crew members $10,000.00 for their assistance with the marijuana.

Sometime thereafter, Wade Tappan arranged a purchase of some of the marijuana from Koethe. A local fisherman named Robert Lacius met Tappan and delivered the marijuana to Tappan. Tappan then called Koethe to arrange payment for the marijuana. The next day, Coy went to Dick's Seafood where Tappan worked. Tappan and Coy drove in separate vehicles to a place several blocks from Dick's Seafood where Tappan placed a knapsack containing $14,000.00 into Coy's vehicle as payment for the marijuana.

On September 12, 1991, a federal grand jury in Tampa, Florida, returned a four-count indictment against Heaton, Reilly, Koethe, and Coy. Count one charged conspiracy to import marijuana in violation of 21 U.S.C. § 963 (1988), and count two charged importation of marijuana in violation of 21 U.S.C. § 952 (1988). Count three charged conspiracy to possess with intent to distribute marijuana in violation of 21 U.S.C. § 846 (1988), and count four charged possession with intent to distribute marijuana in violation of 21 U.S.C. § 841(a) (1988). None of the counts alleged the quantity of marijuana involved. The indictment also sought forfeiture of the two vessels and the home owned by Coy.

The case proceeded to trial. At the close of the Government's evidence, the court granted Heaton's motion for judgment of acquittal on counts one and two. On December 10, 1992, the jury returned guilty verdicts against Heaton on counts three and four, against Reilly on all counts, and against Coy on counts three and four. The jury subsequently returned a special verdict finding that the two vessels and Coy's house were subject to forfeiture.

At the sentencing hearing, the court heard arguments concerning the propriety of imposing mandatory minimum sentences based on the quantity of marijuana involved. The court found that the amount of marijuana involved in the conspiracy [5] exceeded 1000 kilograms, but determined that the mandatory minimum provisions could not be applied to the defendants because of the Government's failure to provide the defendants with sufficient pre-trial notice of its intent to seek such penalties. (R. 11 at 20). Subsequently the court sentenced Coy to forty-two months imprisonment on counts three and four, to run concurrently, and to a special parole term of two years on count four. The court sentenced Heaton to terms of five years imprisonment on counts three and four, to run concurrently, and a special parole term of two years on count four. The court sentenced Reilly to terms of imprisonment of five years on counts one and two, to run concurrently, and five years as to counts three and four, to run concurrently with each other but consecutive with the sentences imposed on counts one and two. The court also imposed a special parole term of five years on counts three and four.

II. Issues on Appeal & Contentions of the Parties

All three defendants contend that there was a prejudicial variance between the indictment, which charged

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[5] The court also noted that the jury had made a determination that a single conspiracy existed and therefore the total amount of marijuana involved would be attributable to each of the co-conspirators. (R.11 at 21-22).

a single conspiracy, and the proof at trial, which they contend established separate conspiracies. In addition, Coy argues that the court violated her due process rights by giving a coercion instruction to the jury when coercion was not a theory of defense she relied upon. Coy also contends that the court erred in failing to sever her trial based on her need for exculpatory testimony from co-defendant Koethe. Heaton and Coy argue that the court erred in rejecting a *Batson* challenge to the Government's peremptory strike of a black juror and in denying a motion for a bill of particulars.[6] Heaton also contends that the court erred in restricting the cross-examination of a Government witness and in ordering forfeiture of the *Dan's Plan*.[7] In response, the Government maintains that all convictions should be affirmed.

Additionally, the Government contends that the district court imposed an illegally short custody sentence when it found that over 1000 kilograms of marijuana were involved in the conspiracy, but refused to impose mandatory minimum ten year sentences pursuant to 21 U.S.C. §§ 841(b)(1)(A)(vii) & 960(b)(1)(G). The defendants counter that the court correctly refused to impose the mandatory minimum penalty provisions because the Government failed to provide adequate notice to the defendants of its intent to seek penalties under these provisions.

III. Discussion

A. Variance

The defendants argue that the indictment erroneously charged them with a single conspiracy and that the proof

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[6] After oral argument in this case, Coy filed a motion, which we subsequently granted, wherein she adopts Heaton's *Batson* argument, his bill of particulars argument, and his variance argument.

[7] We note that Reilly's reply brief, for the first time, attempts to raise the improper restriction of cross-examination argument. Arguments raised for the first time in a reply brief are not properly before a reviewing courts. *United States v. Oakley*, 744 F.2d 1553, 1556 (11th Cir.1984).

at trial revealed multiple conspiracies. Accordingly, they contend that a single conspiracy existed. Because of this variance between the indictment and the proof at trial, the defendants argue, this court must vacate their conspiracy convictions.

As the defendants paint the picture, the airplane drop in the Gulf was a wholly unexpected and unplanned event. When the crews saw the drop, they *separately* picked the bales up, *separately* returned to Madeira Beach, and, ultimately, *separately* distributed their booty. Thus, the implication is that two conspiracies actually existed; one among the defendants associated with the *Dan's Plan* and one among the defendants associated with the *Duke*.

We will not reverse convictions based on a variance unless the variance was (1) material and (2) substantially prejudiced the defendants. *United States v. Reed*, 980 F.2d 1568, 1581 (11th Cir.), *cert. denied*, —— U.S. ——, 113 S.Ct. 3063, 125 L.Ed.2d 745 (1993) (quoting *United States v. Church*, 955 F.2d 688, 697 (11th Cir.), *cert. denied*, —— U.S. ——, 113 S.Ct. 233, 121 L.Ed.2d 165 (1992)). On review of whether a material and prejudicial variance occurred between the indictment and the proof, we employ a two step inquiry. First, viewing the evidence in the light most favorable to the Government, we inquire whether a reasonable jury could have determined beyond a reasonable doubt that a single conspiracy existed. *Id.; United States v. Caporale*, 806 F.2d 1487, 1500 (11th Cir.1986), *cert. denied*, 482 U.S. 917, 107 S.Ct. 3191, 96 L.Ed.2d 679 (1987). Second, we determine whether any substantial prejudice resulted to the defendants if more than one conspiracy did in fact exist. *Church*, 955 F.2d at 697; *United States v. Warren*, 772 F.2d 827, 835 n. 12 (11th Cir.1985).

We conclude that no reasonable jury could have determined beyond a reasonable doubt that there was a single conspiracy. The evidence suggests two similar but sepa-

rate conspiracies. However, we also conclude that no substantial prejudice resulted from the variance.

1. Single vs. Multiple Conspiracies

In determining whether the jury could have found a single conspiracy, we consider the following factors: " '(1) whether a common goal existed, (2) the nature of the scheme underlying the crimes charged, and (3) the overlap of participants.' " *United States v. Adams,* 1 F.3d 1566, 1584 (11th Cir.1993), (quoting *Reed,* 980 F.2d at 1582); *United States v. Jones,* 913 F.2d 1552, 1561 (11th Cir.1990); *Caporale,* 806 F.2d at 1500.

After thoroughly reviewing the record, we conclude that a reasonable jury could not have determined beyond a reasonable doubt that a single conspiracy existed. There is simply an absence of evidence that the two vessels' crews and owners coordinated the importation and subsequent distribution of the marijuana in question. The evidence suggests that two separate conspiracies in fact existed; one involving the crew of the *Duke,* Koethe, and Coy, and another involving the crew of the *Dan's Plan,* Reilly, and Heaton. Application of the required three factors test strengthens our conclusion.

First, it is clear that all those involved shared a common goal to import and/or distribute this marijuana.[8] We emphasize that "common" for the purposes of this test means "similar" or "substantially the same" rather than "shared" or "coordinate."[9] *See Adams,* 1 F.3d at 1584 ("common goal" inquiry satisfied by the common crime of conspirators: importation of marijuana); *U.S. v. LaSpesa,* 956 F.2d 1027, 1031 (11th Cir.1992) (same: fraud); *Jones,* 913 F.2d at 1561 (11th Cir.

[8] By this statement, we do not suggest that the acquittal of Coy and Heaton on the importation charges was incorrect.

[9] If "common" took on this later meaning, there would be little need for further analysis.

1990) (same: distribution of cocaine); *United States v. Khoury*, 901 F.2d 948, 956 (11th Cir.1990) (same: importation of methaqualone).

Second, although the importation schemes were similar,[10] the distribution schemes were distinct. Once the crews brought the marijuana to shore, the two schemes became competely dissimilar. Separate vehicles, manned by separate personnel took the marijuana to separate locations. In turn, Heaton and Reilly sold their marajuana to a purchaser in Michigan while Coy and Koethe sold their marijuana to local customers.

Finally, there was no overlap of participants in the two separate conspiracies. The testimony at trial indicated that the two crews did not assist each other when picking up the marijuana from the water. (R. 6 at 90-92; R. 6 at 202-03; R. 5 at 165-68). The only specific evidence at trial of communication between the vessels was a radio transmission of Koethe saying either "low flying bird" or "low flying duck." (R. 6 at 89; R. 6 at 199-200). The only evidence of common assistance is the testimony of Curtis Joe Johnson, a member of the *Duke's* crew, that Jarrat Lungren, from the crew of the *Dan's Plan*, assisted the *Duke's* crew in offloading their marijuana. (R. 6-101).

Johnson's testimony of common assistance, which we are bound to credit, is simply insufficient to establish the existence of a single conspiracy in this case. *See United States v. Harrison*, 942 F.2d 751, 756-57 (10th Cir. 1991) (when interdepedence among alleged coconspirators cannot be shown, the existence of separate conspiracies must be recognized). The crews of the *Dan's*

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[10] The actions of the vessels were not identical after the crews retrieved the bales from the Gulf. Testimony at trial revealed that after loading the marijuana, the *Duke's* crew continued to fish for some time before heading for Madeira Beach. (R. 6 at 59). The *Dan's Plan*, on the other hand, headed directly for Madeira Beach after loading the marijuana. (R. 6 at 205).

Plan and the *Duke* separately imported this marijuana; both in violation of 21 U.S.C. § 960. Subsequently, the captain and owner of the *Dan's Plan* (Reilly and Heaton) and the captain and owner of the *Duke* (Koethe and Coy), separately distributed the marijuana; all in violation of 21 U.S.C. § 841.

2. Substanial Prejudice

The finding that two conspiracies existed does not end the analysis. We next inquire whether this variance prejudiced the defendants' substantial rights. *United States v. Reed*, 980 F.2d 1568, 1583 (11th Cir.), *cert. denied*, —— U.S. ——, 113 S.Ct. 3063, 125 L.Ed.2d 745 (1993). Such prejudice occurs when "(1) the proof at trial differs so greatly from the charges in the indictment that the defendant is unfairly surprised and has an inadequate opportunity to prepare a defense, or (2) if there are so many defendants and so many separate conspiracies before the jury that there is a substantial likelihood that the jury transferred evidence from one conspiracy to a defendant involved in another conspiracy." *Id.*, (citing *Caporale*, 806 F.2d at 1500; *United States v. Warren*, 772 F.2d 827, 835 n. 12 (11th Cir. 1985), *cert. denied*, 475 U.S. 1022, 106 S.Ct. 1214, 89 L.Ed.2d 326 (1986); *United States v. Hall*, 632 F.2d 500, 504 (5th Cir.1980)[11]); *United States v. Jones*, 913 F.2d 1552, 1561 (11th Cir.1990).

Despite the defendants' detailed arguments concerning the existence of multiple conspiracies rather than a single conspiracy, they fail to articulate what prejudice they suffered as a result. After reviewing the record, we conclude that the defendants' substantial rights were not prejudiced by this variance.

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[11] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (*en banc*), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

First, the defendants were not "unfairly surprised" at trial so as to be prevented from preparing an adequate defense. The crimes the indictment charged and the crimes the separate conspirators committed were identical. Had the indictment charged separate conspiracies, rather than a single conspiracy, it is unlikely the defenses would have varied in any material manner. *See Jones,* 913 F.2d at 1562 (no unfair surprise because variance "did not alter the crime charged, the requisite elements of proof or the appropriate defenses in any significant manner."). More importantly, the defendants do not argue on appeal that surprise prejudiced their defenses.

Second, the defendants have not been prejudiced by any improper transfers of evidence between them. This case does not present a complicated factual scenario with multiple defendants and conspiracies that might lead to significant jury confusion in applying the evidence. *See Reed,* 980 F.2d at 1583. At most only two conspiracies existed. This is a much simpler case than *Caporale,* which involved eleven defendants in a complicated labor union/insurance fraud conspiracy. Even on the complex facts of *Caporale,* we held that there was no risk of significant jury confusion. 806 F.2d at 1501. Additionally, the verdicts in this case demonstrate the jury's ability to sift through the evidence and treat each defendant separately. Only Reilly, who was active in *both* the importation and distribution, was convicted on all charges. Such individual treatment of the defendants by the jury demonstrates the absence of confusion and improper transfers of evidence. *See Reed,* 980 F.2d at 1583; *United States v. LeQuire,* 943 F.2d 1554, 1561 (11th Cir.1991), *cert. denied,* —— U.S. ——, 112 S.Ct. 3037, 120 L.Ed.2d 906 (1992); *Caporale,* 806 F.2d at 1501; *United States v. Rodriguez,* 765 F.2d 1546, 1553 (11th Cir.1985). Thus, the conspiracy convictions are due to be affirmed.

B. Coy's & Heaton's Other Alleged Errors

We have considered the additional issues presented by Coy and Heaton and conclude that they are without merit and do not warrant further discussion. *See* 11th Cir. Rule 36-1.

C. Government's Petition for Mandamus for Correction of Sentences

The Government initially challenged the sentences in this case by appeal, alleging that this court had jurisdiction under 18 U.S.C. § 3742(b)(1) (1988) and 28 U.S.C. § 1291 (1988). After inquiry from the bench and further briefing, the Government conceded that these statutes do not provide this court with jurisdiction over its attempted appeal. Section 3742(b)(1) confers appellate jurisdiction over Government appeals "if the sentence was in violation of law." 18 U.S.C. § 3742(b)(1) (1988). However, section 3742 applies only to offenses committed after its effective date of November 1, 1987. *Sentencing Act of 1987,* Pub.L. No. 100-182, § 2, 101 Stat. 1266 (1987); *United States v. Martinez-Zayas,* 857 F.2d 122, 127 (3d Cir.1988). As the subject offenses occurred before the effective date, the statute does not confer jurisdiction in this case.[12]

The Government has asked that we treat its ineffective appeal in this case as a petition for mandamus relief. We may treat an ineffective appeal as a petition for a writ of mandamus pursuant to 28 U.S.C. § 1561(a) (1988) in appropriate cases. *See, e.g., Dobard v. Johnson,* 749 F.2d 1503, 1508 (11th Cir.1985) (attempted appeal treated as a petition for writ of mandamus); *Hines v. D'Artois,* 531 F.2d 726, 732 (5th Cir.1976) ("we . . . have the discretionary authority to treat [an] attempted appeal as a petition for mandamus"). As we explained in *Hines,*

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[12] Apparently the Government also concedes that 28 U.S.C. § 1291 is similarly unavailing as jurisdiction for its appeal.

> Mandamus . . . is an extraordinary remedy reserved for extraordinary situations . . . but the limited availability of the writ does not preclude our examination of an attempted appeal to determine whether the action appealed from reflected the sort of abuse of discretion which would render the writ appropriate.

531 F.2d at 732 (citations omitted).

In order to be entitled to a writ of mandamus, a party must demonstrate that no other remedy is available and that it has a "clear and indisputable" right to the writ's issuance. *In re Capital Cities/ABC, Inc.*, 918 F.2d 140, 144 (11th Cir.1990); *United States v. Noriega*, 917 F.2d 1543, 1546 n. 3 (11th Cir.), *cert. denied*, 498 U.S. 976, 111 S.Ct. 451, 112 L.Ed.2d 432 (1990). Prior to the enactment of 28 U.S.C. § 1651(a), mandamus was the only remedy available to the prosecution for correction of an illegal sentence. *See United States v. Cannon*, 778 F.2d 747, 748 (11th Cir.1985); *United States v. Dean*, 752 F.2d 535, 545 (11th Cir.1985), *cert. denied*, 479 U.S. 824, 107 S.Ct. 97, 93 L.Ed.2d 48 (1986); *United States v. Denson*, 603 F.2d 1143, 1147 (5th Cir. 1979) (en banc).

The Government argues that the sentences in this case were illegally short because the district court refused to impose the mandatory minimum provisions of 21 U.S.C. §§ 841(b)(1)(A)(vii) & 960(b)(1)(G) after finding that more than 1000 kilograms of marijuana were involved in the conspiracy. We review the propriety of a district court's application and interpretation of federal statutes *de novo*. *See United States v. Huppert*, 917 F.2d 507, 510 (11th Cir.1990).

The language of 21 U.S.C. §§ 841(b)(1)(A)(vii) & 960(b)(1)(G) clearly provides that any person convicted of distributing or importing more than 1000 kilograms of marijuana shall be subject to a mandatory

minimum sentence of ten years imprisonment. The district court found that more than 1000 kilograms were involved in the offenses (R. 11 at 22) but concluded that mandatory minimum sentences should not be imposed because the Government had failed to give the defendants pre-trial notice of its intent to seek such penalties. (R. 11 at 20). The court reached this conclusion based on its belief in the continued viability of *United States v. Alvarez*, 735 F.2d 461 (11th Cir.1984).

In *Alvarez*, we held that for purposes of the enhanced sentencing provisions of 21 U.S.C. § 841(b)(1) (1982), the quantity of marijuana involved was a critical element of the offense. 735 F.2d at 467-68. Because the indictment had failed to allege a specific quantity of marijuana, we vacated the defendants' enhanced sentences. *Id.* Following *Alvarez*, we have held that quantity is *not* an element of an offense under § 841(b)(1) and is an issue relevant only to sentencing. *United States v. Cross*, 916 F.2d 622, 623 (11th Cir.1990), *cert. denied*, 499 U.S. 929, 111 S.Ct. 1331, 113 L.Ed.2d 263 (1991); *United States v. Williams*, 876 F.2d 1521 (11th Cir.1989); *United States v. Smith*, 840 F.2d 886, 888 (11th Cir.) *cert. denied*, 488 U.S. 859, 109 S.Ct. 154, 102 L.Ed.2d 125 (1988).

Alvarez's apparent conflict with *Cross*, *Williams*, and *Smith* was explained in our recent decisions in *United States v. Perez*, 960 F.2d 1569, 1574-75 (11th Cir. 1992), *cert. denied*, —— U.S. ——, 113 S.Ct. 1421, 122 L.Ed.2d 790 (1993). In *Perez*, we explained that the Supreme Court's decision in *McMillan v. Pennsylvania*, 477 U.S. 79, 84, 106 S.Ct. 2411, 2415, 91 L.Ed.2d 67 (1986), precipitated the *Cross* court's departure from *Alvarez*. *Id.* *McMillan* held that the prosecution is only required to prove beyond a reasonable doubt "all of the elements included in the definition of the offense of which the defendant is charged." *Cross*, 916 F.2d at 623 (quoting *McMillan*, 477 U.S. at 85, 106 S.Ct. at 2327). The *Cross* court reasoned that § 841

(a) defined the offense which the Government was required to prove, but that § 841(b) operated as a sentencing provision and only became applicable after a violation of § 841(a) had been proven. *Cross,* 916 F.2d at 623. Since *Cross,* it is clear that in this circuit the Government need not prove quantity at trial, *United States v. Adams,* 1 F.3d 1566, 1582 (1993); *United States v. Andrews,* 953 F.2d 1312, 1318 (11th Cir.), *cert. denied,* —— U.S. ——, 112 S.Ct. 3007, 120 L.Ed.2d 882 (1992); *United States v. Van Hemelryck,* 945 F.2d 1493, 1503 (11th Cir.1991); *Cross,* 916 F.2d at 623, nor allege a specific quantity in an indictment, *United States v. Milton,* 979 F.2d 839, 840 (11th Cir.), *cert. denied,* —— U.S. ——, 113 S.Ct. 824, 121 L.Ed.2d 695 (1992); *Perez,* 960 F.2d at 1574-75, in order to subject defendants to enhanced sentences based on quantity under § 841(b)(1). The same conclusions apply to prosecutions for importation offenses in violation of § 960(a) which involve enhanced penalties based on quantity under § 960(b). *Adams,* 1 F.3d at 1582. Thus, it is clear that the *Alvarez* rule is no longer the law of this circuit. *See Perez,* 960 F.2d at 1574; *United States v. Olness,* 9 F.3d 716, 717 (8th Cir.1993) (citing *Perez* for the proposition that *Alvarez* is no longer followed in our circuit).

The district court recognized *Alvarez*'s apparent conflict with *Cross,* but reasoned that *Alvarez* still had some continuing viability. (R. 11 at 20). Based on this belief, the court held that the defendants were entitled to pre-trial notice of the Government's intent to seek mandatory minimum sentences under § 841(b)(1)(B). We conclude that the court erred in this determination and that the Government is entitled to mandamus relief.

As previously discussed, the quantity of drugs involved in a defendant's prosecution under § 841 or § 960 is not an element of the offense that need be pled or proven at trial, but an issue for the court to determine at the sen-

tencing phase. *See, e.g., Perez,* 960 F.2d at 1574-75. Therefore, due process requires only that a defendant be given pre-sentencing notice, not pre-trial notice, of potential sentences based on quantity under § 841 or § 960. *See id.* at 1575.

In *Perez,* the court found "the Government's responses to the standing discovery order adequately put the defendants on notice of the quantity . . . allegedly involved." *Id.* at 1474-75. In this case, the pre-sentence investigation reports on each of the defendants indicated that "approximately 3000 pounds of marijuana" (will over 1000 kilograms) was involved.[13] (Defs. Present. Rep. at 3). Therefore, the defendants had notice of the quantity involved; this necessarily gave them notice that, under 21 U.S.C. §§ 841(b)(1)(A)(vii) & 960(b)(1)(G), they faced ten year mandatory minimum sentences if quantity was proven at sentencing. The defendants were not entitled to further notice of the Government's "intent" to seek ten year mandatory minimum sentences because under 21 U.S.C. §§ 841(b)(1)(A)(vii) & 960(b)(1)(G) this was the sentence the district court was *required* to impose if the alleged quantity was proven at

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[13] Additionally, a review of the trial transcript reveals that the defendants' counsels all had notice of the ten year mandatory minimum sentences. Throughout the trial, defense counsels questioned Government witnesses on their knowledge of the ten year mandatory minimum penalty each defendant faced. (R.6 at 54; R.6 at 153; R.8 at 143)

Perhaps the most telling statement is that of Coy's counsel, when she attempted to argue to the court at the close of the Government's case that weight was an issue the Government had to prove at trial. The following excerpt, concerning a statement made at a pre-trial bail hearing, indicates that the defendants had notice of the weight and the mandatory minimum sentences:

> MS JAMES: He [Government's attorney] stood before the magistrate and told the magistrate that this is *a minimum mandatory case,* your honor, because it involves over *3,000 pounds of marijuana.*

(R.8 at 178) (emphasis added).

sentencing. As explained in *Perez*, if quantity is established by a preponderance of the evidence at sentencing and all due process requirements are met, "courts are constrained to apply the sentencing framework established by statute." 960 F.2d at 1575.

Hence, the Government is entitled to mandamus relief as the sentences imposed were illegal under §§ 841(b)(1)(A)(vii) & 960 (b)(1)(G) based on the court's determination of quantity. *See United States v. Huss*, 520 F.2d 598, 602 (2d Cir.1975) ("[I]llegal sentence . . . is one . . . contrary to applicable statute."); *see also United States v. Story*, 891 F.2d 988, 991 (2d Cir.1989) (defining "illegal sentence" as one imposed contrary to U.S. Sentencing Guidelines). The defendants' sentences are vacated and this case is remanded to the district court for resentencing.

Having found that two separate conspiracies existed, we necessarily conclude that the district court erred in attributing the total amount of marijuana involved in both conspiracies to each of the defendants. At resentencing the district court should determine the amount of marijuana attributable to each of the defendants in light of this opinion. Should the amount exceed 100 kilograms, a five year mandatory minimum sentence will be applicable. 21 U.S.C. §§ 841(b)(1)(B)(vii) & 960(b)(2)(G). Should the amount exceed 1000 kilograms, a ten year mandatory minimum sentence will be applicable. 21 U.S.C. §§ 841(b)(1)(A)(vii) & 960(b)(1)(G).

IV. Conclusion

We affirm the defendants' convictions and grant the Government's petition for mandamus. Accordingly, we vacate the defendants' sentences and remand to the district court for resentencing consistent with this opinion. The mandatory minimum sentence provisions of 21 U.S.C. §§ 841(b)(1) & 960(b) will be applicable if the

court determines that a defendant is chargeable with an amount of marijuana that triggers these provisions.

AFFIRMED IN PART; PETITION FOR MANDAMUS GRANTED; VACATED IN PART AND REMANDED.

APPENDIX B

[Filed Apr. 17, 1992]

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA—TAMPA

Case Number: 91-260-Cr-T-21-A

UNITED STATES OF AMERICA

v.

JOSEPH REILLY
324 Bay Plaza
Treasure Island, Florida 33706

JUDGMENT IN A CRIMINAL CASE

THE DEFENDANT ENTERED A PLEA OF:

[☐ guilty ☐ nolo contendere] as to count(s) ———, and

☐ not guilty as to count(s) ———.

THERE WAS A:

[☐ finding ☒ verdict] of guilty as to count(s) one (1), two (2), three (3) and four (4)—Indictment

THERE WAS A:

[☐ finding ☐ verdict] of not guilty as to count(s) ———

☐ judgment of acquittal as to count(s) ———.

The defendant is acquitted and discharged as to this/these count(s).

THE DEFENDANT IS CONVICTED OF THE OFFENSE(S) OF: Ct. 1—Conspiracy to import into the United States from a place outside thereof a Substance Containing a detectible amount of the Schedule 1 controlled substance, Marijuana, 21 USC 952(a) and 963. Ct. 2—Importation into the United States from a place outside thereof a Substance Containing a detectible amount of the Schedule 1 Controlled Substance, Marijuana, 21 USC 952(a). Ct. 3—Conspiracy to possess with intent to distribute a Substance Containing Marijuana, 21 USC 841(a)(1) and 846. Ct. 4—Possession with intent to distribute a Substance Containing a detectible amount of the Schedule 1 Controlled Substance, Marijuana, 21 U.S.C. 841(a).

IT IS THE JUDGMENT OF THIS COURT THAT:

Defendant is hereby committed to the custody of the Attorney General or its authorized representative:

As to Counts 1 and 2—FIVE (5) YEARS, to be served concurrently.

As to Counts 3 and 4—five (5) YEARS, to be served consecutive to the offenses on Counts 1 and 2 and concurrent with each other.

Defendant to serve a special parole term on Counts 2 and 4 of two (2) years.

/s/ Alycia H. Waller

APPENDIX C

Excerpt from Transcript of Petitioner's Sentencing Proceeding of February 6, 1992

* * * *

[16] THE COURT: Okay. I think you're repeating yourself now. If you have anything new, I will be glad to hear anything further on rebuttal—not new, but in rebuttal.

Okay. Anything further with respect to any of the other pending matters before the Court prior to the Court's ruling? If not, I will proceed to announce my ruling, or rulings.

The defendant Heaton has filed a written motion for new trial and other relief seeking relief under Rule 29 (C), Motion for Judgment of Acquittal as to Counts 2 and 3—I assume you meant Counts 3 and 4—and the forfeiture, and for relief pursuant to Rule 33 for a new trial, and Rule 34 for an arrest of judgment on the forfeiture count. I'm going to deny that motion.

There is one aspect of it that I feel it appropriate to announce the Court's rationale, and that is the contention by the defendant Heaton in that motion—and in fact I [17] believe that similar assertions have been made by all defendants, and the Court will be addressing this as to the reserved rulings that the Court has made on motions made at the close of all of the evidence in the case.

The Court would observe that both the conspiracy to import—excuse me—I believe it was a question of fact for the jury as to whether a single conspiracy charged in the indictment was proved.

The jury was properly instructed on the law of single versus multiple conspiracies. A jury's finding that the single conspiracy charged in the indictment was proved should be disturbed only if the evidence viewed in the light most favorable to the government would not permit

reasonable jurors to find beyond a reasonable doubt that there was a single conspiracy.

As stated by the Court in United States versus Allison, 908 Federal 2d 1531, the Court should consider the following factors in determining whether the evidence supports the jury's finding of a single conspiracy: one, whether a common goal existed; two, the nature of the scheme; and, three, overlap of the participants.

Of course, it must be recognized that the agreement necessary for a conspiracy to exist need not be formal or explicit. It is sufficient If there is a concert of action with the parties working together with a common design, [18] purpose and understanding. A tacit understanding is sufficient.

In this case, the two vessels were in the same vicinity when the low-flying airplane jettisoned its cargo. There was radio communication between the two vessels regarding the air drop. Both vessels proceeded to retrieve the bales of marijuana; and both vessels returned to the same port with the bales within a relatively short period of time from each other.

Jarret Lundgren, the first mate of the Dan's Plan, who the jury could regard as one of the conspirators based on the evidence, assisted the off-loading of the marijuana from the other vessel, the Duke.

I agree with the government's position that the evidence supports the conclusion that a scheme existed with the common goal of possessing marijuana with the intent to distribute it.

And although some of the personnel may have changed and the marijuana was in fact distributed through separate channels, the nature of the scheme and the common goal were consistent throughout.

* * * *

[21] THE COURT: No, I wasn't addressing that. Thank you for bringing that to my attention.

For the record, perhaps it would be well for me to observe that the quantity involved—given the Court's ruling earlier with respect to the single conspiracy aspect of this and the Court's view that this was a question under the evidence for the jury to determine whether we were dealing with a single conspiracy, I am of the view that the total amount of the marijuana involved that was picked up was picked up through the single conspiracy, and therefore the total amount of marijuana could be lumped together.

Now, that becomes unimportant in view of the Court's [22] ruling on the minimum mandatory provisions. However, I make that observation in the event that my superiors disagree with me and that may become relevant.

MR. MOORE: Excuse me, Judge.

THE COURT: Yes, sir.

MR. MOORE: Would the Court enter a finding at this time as to whether that amount was in excess of one thousand kilograms?

THE COURT: The Court, I suppose in a lame effort to do that, didn't do that very good.

The Court is of the view—and would make a finding—that the amount of marijuana as to each of the counts for which the defendants were convicted is in excess of one thousand kilos, and specifically—I recall your analysis, Mr. Moore, of that issue. And as I recall, the quantity that you were suggesting from the evidence appeared to coincide with my—what was that amount?

MR. MOORE: Based on the testimony of Curtis Johnson and Jarret Lundgren, Your Honor, it would be 1,400 pounds for one vessel, 1,500 pounds for the second vessel, which would have been a total of 2,900 pounds.

THE COURT: 2,900 pounds, which is substantially in excess of a thousand kilos; the Court would find that from the evidence.

All right. Now, Joseph Reilly, you having been [23] found guilty by a jury of the offense of conspiracy to import under Count 1; importation under Count 2; conspiracy to possess with intent to distribute, Count 3; and possession with intent to distribute, Count 4; the Court adjudges you to be guilty of those offenses.

And, Daniel Heaton, you having been found guilty by the jury of the offense of conspiracy to possess with intent to distribute as charged in Count 3 of the indictment, and having been found guilty of the offense of possession with intent to distribute marijuana as charged in Count 4, the Court now therefore adjudges you to be guilty of those offenses.

Mary Sue Coy, you having been found guilty by the jury of the offense charged in Count 3, that is, conspiracy to possess with intent to distribute marijuana, and Count 4, the offense of possession with intent to distribute marijuana, the Court now therefore adjudges you to be guilty of those offenses.

* * * *

[35] MR. DEMINICO: Your Honor, for the record, I take it it's accurate that the colloquy that just happened was not pertaining to the sentencing of Mr. Reilly, is that correct?

THE COURT: It pertained to the determination of whether the period of supervision after the period of incarceration would either be a period of supervised release or a special parole term.

MR. DEMINICO: So, it was a technical discussion as opposed to substantive?

THE COURT: Yes.

MR. DEMINICO: Thank you, Your Honor.

THE COURT: That's correct.

Okay. Anything further before I impose sentence?

MR. MOORE: Not from the government, Your Honor.

MR. DEMINICO: No, Your Honor.

THE COURT: Is there any cause to show why sentence should not now be imposed?

MR. DEMINICO: No, Your Honor.

THE COURT: The Court having asked counsel and the defendant why judgment and sentence should not now be pronounced, and no cause to the contrary appearing to the Court, and the defendant and attorney having made a statement on behalf of the Court—on behalf of the defendant, and the Court having reviewed the presentence investigation report, it [36] is the judgment of the Court as to each of the four counts which he has been found guilty of that the defendant be committed to the custody of the Bureau of Prisons to be imprisoned for a term of ten years, each sentence to run concurrently.

Upon release from imprisonment as to each count, the defendant shall be placed on supervised release for a term of three years. And while on supervised release, the defendant shall comply with the standard conditions adopted by the Court in the Middle District of Florida.

I would, of course, point out that this, of course, is not a guidelines sentence, but it is a sentence that is subject to parole.

The Court having pronounced sentence, does counsel for the defendant or the Government have any objections to the sentence or to the manner in which the Court pronounced sentence, other than perhaps those that might have already been made?

MR. DEMINICO: Your Honor, with respect to those issues, I would defer to counsel who may be appointed by the Court, or such other counsel as may take these issues up on appeal.

For myself, I have no objection, reserving only those which may be found by a review of his appointed or other attorney on appeal.

[37] THE COURT: All right. Mr. Reilly, I would advise you that it is your right to appeal from these judgments and sentences; and any such appeal must be done within ten days from this date. Failure to appeal within that ten-day period shall be a waiver of your right

to appeal. The Government may, of course, file an appeal as well.

MR. MOORE: For the record, Your Honor, the Government would reserve its objection with respect to the finding of mandatory minimum applicability.

THE COURT: Surely.

You're also advised, Mr. Reilly, that you are entitled to the assistance of counsel in taking an appeal. And if you're unable to afford an attorney, one will be provided for you.

MR. DEMINICO: Touching on that issue, has Your Honor had an opportunity to review my motion with respect to Mr. Shifke?

THE COURT: No, I haven't, and I think what I would do is refer that to the magistrate for disposition.

MR. DEMINICO: Very well, Your Honor. I shall set that forthwith. Was it Magistrate Wilson?

THE COURT: Was that magistrate Wilson?

THE DEPUTY CLERK: Charles Wilson.

MR. DEMINICO: Charles Wilson? I will set that forthwith, Your Honor.

[38] THE COURT: All right. The defendant will be remanded to the custody of the marshal.

Daniel Heaton, please step forward. Mr. Heaton, do you know of any reason why this Court should not now proceed to imposition of sentence?

DEFENDANT HEATON: No, sir.

MR. DILLINGER: Judge, without waiving any legal matters before, there's no legal cause why not to proceed, but there is one issue I can either address now or later—it may be moot—and that's the—I said earlier that my understanding of the statute is zero to five. I say that on the basis of under 21-841, large D, it states that in the case of less than 50 kilos of marijuana, except in the case of 50 or more plants, regardless of weight, ten kilos of hash, or a kilo of hash oil, a person shall be sentenced to a term of imprisonment of not more than five years.

I think that in light of the Court's ruling regarding that the minimum mandatory not being applicable, in

light of the Alvarez case that indicated that it's the least culpable aspect that they are in essence stuck with, that that is the maximum sentence, five years.

THE COURT: As to each count?

MR. DILLINGER: Yes, sir.

THE COURT: Mr. Moore?

MR. MOORE: Judge, I'm not in a position to argue [39] against Mr. Dillinger's position. When you ruled that a penalty enhancement—if that's what you want to call it—did not apply, I was under the impression that the zero to five would apply; but I'm not advancing that that's the correct sentence; I haven't researched that issue.

THE COURT: Okay. Well . . .

MR. MOORE: I raised the issue with Mr. Willliams when you imposed sentence upon Mr. Reilly.

If the Court is holding that their due process rights have been violated by the failure of the Government to give notice, then if—and I don't want to be arguing for the defendants—my position remains the same—it ought to be a ten-year mandatory minimum, but given the fact—

THE COURT: Sure, I understand. But to be consistent—

MR. MOORE: To be consistent, for consistency, although I have not researched the law, and I don't hold myself out as representing to you that that's the correct law.

THE COURT: I think you're probably right, and so I think we had better proceed to resentence Mr. Reilly.

Take a seat, please, Mr. Heaton.

MR. DEMINICO: For the record, Your Honor, I'm adopting Mr. Dillinger's argument with respect to the five-year maximum.

THE COURT: All right. It's been brought to my [40] attention that five years would be the statutory maximum as to each count.

So, the Court hereby vacates and sets aside the sentence just imposed as to Mr. Reilly.

All right. As to counts 1 and 2, the Court imposes a sentence of five years commitment to the custody of the Bureau of Prisons; those two five-year sentences to run concurrently.

And as to the offenses with respect to counts 3 and 4, the Court imposes five-year sentences, commitment to the custody of the Bureau of Prisons. Those two offenses, 3 and 4, as to Counts 3 and 4, would be consecutive to the offenses just imposed, but concurrent with each other. That is, the offenses with respect to Counts 1 and 2 would be five years each, concurrent with each other. Sentences as to Counts 3 and 4 shall be concurrent with each other, but consecutive to the offenses imposed as to Counts 1 and 2.

MR. DEMINICO: Excuse me. Again, eligibility for parole would apply in this case?

THE COURT: Yes, yes.

MR. MOORE: —Judge, one other thing—

THE COURT: Just a moment.

MR. MOORE: —I believe under the sentencing statute, Judge, that you would be required to also impose a special parole term of at least two years with respect to [41] Counts 2 and 4, I believe.

THE COURT: All right. The special parole term as to Counts 2 and 4 will be imposed; three years will be imposed.

THE PROBATION OFFICER: Only two is authorized by statute, Your Honor.

THE COURT: Only Count 2 or number of—

THE PROBATION OFFICER: Two years.

THE COURT: Two years?

THE PROBATION OFFICER: Yes. They are only required on the substantive counts, not on the conspiracies. So, Counts 2 and 4 would have the special—

THE COURT: All right. Counts 2 and 4 are the substantive counts, so the period of supervised—special parole term will be imposed only as to those counts.

All right. Thank you very much.

* * * *

APPENDIX D

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 91-260-CR-T-21A

UNITED STATES OF AMERICA

v.

JOSEPH REILLY, RAYMOND KOTHE,
MARY SUE COY, and DANIEL HEATON

SUPERSEDING INDICTMENT

The Grand Jury charges that:

COUNT ONE

From on or about an unknown date to in or about June, 1987, in the Middle District of Florida, and elsewhere, the defendants,

JOSEPH REILLY,
RAYMOND KOTHE,
MARY SUE COY, and
DANIEL HEATON,

did knowingly and intentionally combine, conspire, confederate and agree with each other and with other persons, know and unknown to the Grand Jury, to import into the United States from a place outside thereof, a mixture or substance containing a detectable amount of the Schedule I controlled substance, marihuana.

In violation of Title 21, United States Code, Section 952(a) and 963.

COUNT TWO

In or about the spring of 1987, in the Middle District of Florida, the defendants,

JOSEPH REILLY,
RAYMOND KOTHE,
MARY SUE COY, and
DANIEL HEATON,

along with other persons known and unknown to the Grand Jury, aided and abetted by each other, did knowingly and intentionally import into the United States from a place outside thereof, a mixture or substance containing a detectable amount of the Schedule I controlled substance, marihuana;

In violation of Title 21, United States Code, Section 952(a) and Title 18, United States Code, Section 2.

COUNT THREE

From on or about an unkonwn date in or about June, 1987, in the Middle District of Florida, and elsewhere, the defendants,

JOSEPH REILLY,
RAYMOND KOTHE,
MARY SUE COY, and
DANIEL HEATON,

did knowingly and intentionally combine, conspire, confederate, and agree with each other and with persons known and unknown to the Grand Jury, to possess with the intent to distribute a mixture or substance containing a detectable amount of the Schedule I controlled substance, marihuana;

In violation of Title 21, United States Code, Section 841(a)(1) and 846.

COUNT FOUR

In or about the spring of 1987, in the Middle District of Florida, the defendants,

JOSEPH REILLY,
RAYMOND KOTHE,
MARY SUE COY, and
DANIEL HEATON,

along with other persons known and unknown to the Grand Jury, aided and abetted by each other, did knowingly and intentionally possess with intent to distribute a mixture or substance containing a detectable amount of the Schedule I controlled substance, marihuana;

In violation of Title 21, United States Code, Section 841(a) and Title 18, United States Code, Section 2.

FORFEITURE

Though the violations alleged in Count One through Four of this Indictment, said Counts punishable by imprisonment for more than one year, which Counts are realleged and incorporated as if more fully set forth herein, the defendants did obtain, use or intend to use property, in any manner or part, to commit and to facilitate the commission of such violation, therefore making the defendants' interest in said property forfeitable to the United States pursuant to Title 21, United States Code, Section 853.

Said property, interest, claims and contractual rights include, but are not limited to, the following:

1. The Northeast ¼ of Lot 4 and the South 50 feet of the Southeast ¼ of Lot 5, COUNTRY GENTLEMEN ACRES, according to the map or plat thereof as recorded in Plat Book 34, Page 70 of the Public Records of Pinellas County, Florida.

2. The fishing vessel Dan's Plan, a 1978 fiberglass Thompson Trawler, Official Coast Guard Number 598875, together with its equipment, tackle and apparell.

3. The fishing vessel Duke Official Coast Guard Number 546631, together with its equipment, tackle and apparell.

All the above-described property is forfeitable to the United States pursuant to Title 21, United States Code, Section 853.

A TRUE BILL,

_____

Foreman

ROBERT W. GENZMAN
United States Attorney

By: /s/ Dennis I. Moore
DENNIS I. MOORE
Assistant United States Attorney

/s/ Todd Foster
TODD FOSTER
Assistant United States Attorney
Chief, Major Crimes Section

APPENDIX E

Jury Instruction on Single Conspiracy Versus Multiple Conspiracies

You are further instructed, with regard to the alleged conspiracy offense, that proof of several separate conspiracies is not proof of the single, overall conspiracy charged in the indictment unless one of the several conspiracies which is proved is the single conspiracy which the indictment charges.

What you must do is determine whether the single conspiracy charged in the indictment existed between two or more conspirators. If you find that no such conspiracy existed, then you must acquit the defendants of that charge. However, if you decide that such a conspiracy did exist, you must then determine who the members were; and, if you should find that a particular defendant was a member of some other conspiracy, but not the one charged in this indictment, then you must find the defendant not guilty.

In other words, to find a defendant guilty, you must unanimously find that he or she was a member of the conspiracy charged in *this* indictment here before you, and not a member of some other separate conspiracy.

Supreme Court, U.S.
F I L E D
SEP 21 1994
OFFICE OF THE CLERK

No. 94-160

In the Supreme Court of the United States

OCTOBER TERM, 1994

JOSEPH A. REILLY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
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QUESTION PRESENTED

Whether petitioner was prejudiced by any variance between the charges in the indictment and the proof at trial.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-160

JOSEPH A. REILLY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 19 F.3d 629.

JURISDICTION

The judgment of the court of appeals was entered on April 27, 1994. The petition for a writ of certiorari was filed on July 26, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted of conspiring to import marijuana (Count 1), in violation of 21 U.S.C. 963; importing marijuana (Count 2),

in violation of 21 U.S.C. 952(a); conspiring to possess marijuana with the intent to distribute it (Count 3), in violation of 21 U.S.C. 846; and possessing marijuana with the intent to distribute it (Count 4), in violation of 21 U.S.C. 841(a)(1). He was sentenced to ten years' imprisonment, to be followed by a two-year term of special parole. The court of appeals affirmed petitioner's convictions but vacated his sentence and remanded for resentencing. Pet. App. 1a-18a.

1. Petitioner was the captain of the *Dan's Plan*, a fishing boat based in Madeira Beach, Florida. In February 1987, he was on board the *Dan's Plan* in the Gulf of Mexico 60 miles west of the Florida coast. The *Dan's Plan* had just completed a fuel transfer with the *Duke*, another fishing boat based in Madeira Beach, when a crew member on the *Dan's Plan* saw a small private airplane pursued by a United States Customs airplane. Crew members on both the *Dan's Plan* and the *Duke* then saw the private airplane dump bales of marijuana into the Gulf. Petitioner had several bales loaded onto the *Dan's Plan*; the other bales were loaded onto the *Duke*. The *Dan's Plan* returned to Madeira Beach; its load of marijuana was sold to a buyer in Michigan. The *Duke* returned to Madeira Beach later the same day; some of its load of marijuana was sold to a local fisherman. Pet. App. 2a-4a.

2. At trial, the district court instructed the jury that it could convict petitioner only if it found that he and his co-defendants—the owner of the *Dan's Plan* and the captain and the owner of the *Duke*—were involved in a single conspiracy, as charged in Counts 1 and 3 of the indictment (Pet. App. 33a):

> You are further instructed, with regard to the alleged conspiracy offense, that proof of several

> separate conspiracies is not proof of the single, overall conspiracy charged in the indictment unless one of the several conspiracies which is proved is the single conspiracy which the indictment charges.
>
> What you must do is determine whether the single conspiracy charged in the indictment existed between two or more conspirators. If you find that no such conspiracy existed, then you must acquit the defendants of that charge. However, if you decide that such a conspiracy did exist, you must then determine who the members were; and, if you should find that a particular defendant was a member of some other conspiracy, but not the one charged in this indictment, then you must find the defendant not guilty.
>
> In other words, to find a defendant guilty, you must unanimously find that he or she was a member of the conspiracy charged in *this* indictment here before you, and not a member of some other separate conspiracy.

The jury found petitioner guilty on all counts.[1]

3. The court of appeals affirmed petitioner's convictions. Pet. App. 1a-18a. The court first determined that there was a variance between the indictment and the proof at trial; although the indictment charged petitioner with a single conspiracy to import and distribute mari-

---

[1] Daniel Heaton, the owner of the *Dan's Plan*, and Mary Sue Coy, the owner of the *Duke*, were each convicted on Counts 3 and 4 (charging conspiracy to possess, and possession with intent to distribute, marijuana) and acquitted on Counts 1 and 2 (charging conspiracy to import, and importation of, marijuana). Raymond Kothe, the captain of the *Duke*, was tried separately because of medical problems. Pet. App. 2a & n.1, 5a.

juana, the evidence at trial established that the crew of the *Dan's Plan* and the crew of the *Duke* were involved in separate conspiracies. The court explained (*id.* at 8a):

> There is simply an absence of evidence that the two vessels' crews and owners coordinated the importation and subsequent distribution of the marijuana in question. The evidence suggests that two separate conspiracies in fact existed; one involving * * * the *Duke* * * * and another involving * * * the *Dan's Plan*.

The court further held, however, that the variance between the indictment and the proof at trial was not prejudicial. The court observed that a variance is prejudicial when (Pet. App. 10a (internal quotation marks omitted))

> (1) the proof at trial differs so greatly from the charges in the indictment that the defendant is unfairly surprised and has an inadequate opportunity to prepare a defense, or (2) if there are so many defendants and so many separate conspiracies before the jury that there is a substantial likelihood that the jury transferred evidence from one conspiracy to a defendant involved in another conspiracy.

After reviewing the record, the court determined that neither of those conditions obtained. *Ibid.* It noted that petitioner had not claimed unfair surprise, nor could he do so: "Had the indictment charged separate conspiracies, rather than a single conspiracy, it is unlikely the defenses would have varied in any material manner." *Id.* at 11a. The court also determined that there was no basis for concluding that the jury transferred evidence between the two conspiracies: "This case does not present a complicated factual scenario with multiple

defendants and conspiracies that might lead to significant jury confusion in applying the evidence. At most only two conspiracies existed." *Ibid.*[2]

ARGUMENT

1. Petitioner contends (Pet. 9-15) that the court of appeals erred in analyzing this case as one involving a variance between the charges in the indictment and the proof at trial. That contention is foreclosed by this Court's decisions in *Berger* v. *United States*, 295 U.S. 78 (1935), and *Kotteakos* v. *United States*, 328 U.S. 750 (1946).

In *Berger*, the defendant was charged with conspiring with seven other people to utter counterfeit Federal Reserve Bank notes. 295 U.S. at 79-80. The evidence at trial "tended to establish not a single conspiracy as charged but two conspiracies," only one of which involved the defendant. *Id.* at 80. The Court rejected the defendant's argument that the variance was "fatal." *Id.* at 81. The Court said that "[t]he true inquiry * * * is not whether there has been a variance in proof, but

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[2] At sentencing, the district court determined that the evidence showed a single conspiracy involving both the *Dan's Plan* and the *Duke*, and that the conspiracy involved more than 1000 kilograms of marijuana. See Pet. App. 5a. The district court refused, however, to impose the mandatory minimum penalties required by 21 U.S.C. 841(b)(1)(A)(vii) for conspiracies involving such quantities on the ground that the government had not provided pretrial notice of its intent to seek them. See Pet. App. 5a. The government appealed the sentences. Treating the government's sentencing appeal in this pre-Guidelines case as a petition for a writ of mandamus, *id.* at 12a-13a, the court of appeals concluded that the government was not required to provide pretrial notice of its intention to seek the enhanced penalties. *Id.* at 15a. It accordingly vacated the sentences and remanded for resentencing. *Id.* at 17a. That ruling is not at issue here.

whether there has been such a variance as to 'affect the substantial rights' of the accused." *Id.* at 82 (quoting Section 269 of the Judicial Code, 28 U.S.C. 391 (1946), incorporated in relevant part in 28 U.S.C. 2111). The Court held that, under the circumstances of that case, "the variance was not prejudicial and hence not fatal." 295 U.S. at 84. The Court explained that there was nothing in the record to indicate that the evidence regarding the conspiracy of which the defendant was not a member "operated to prejudice his case, or that it came as a surprise." *Id.* at 83.

In *Kotteakos*, the Court undertook the same inquiry to determine "whether [the defendants] have suffered substantial prejudice from being convicted of a single general conspiracy by evidence which the Government admits proved not one conspiracy but some eight or more different ones." 328 U.S. at 752. The Court observed that "the errors in variance" in the case before it "were identical in character" to those at issue in *Berger*. *Id.* at 766. The Court also observed that in both cases the trial court had instructed the jury "that only a single conspiracy had been charged and therefore more could not be proved." *Id.* at 766 n.21. Despite "[t]hese * * * abstract similarities" (*id.* at 772), the Court in *Kotteakos* concluded that the variance involved there, unlike that in *Berger*, was prejudicial. See *id.* at 766-777. In so concluding, the Court emphasized that the evidence presented a "danger[] of transference of guilt from one [defendant] to another across the line separating [the] conspiracies." *Id.* at 774.

The court of appeals in this case properly applied the analysis of *Berger* and *Kotteakos*. Here, as in *Berger* and *Kotteakos*, the defendant was charged with a single conspiracy, and the jury was instructed that it had to find that the defendant belonged to "the single, overall

conspiracy charged in the indictment," rather than "several separate conspiracies" (Pet. App. 33a); the evidence at trial, however (as evaluated by the court of appeals), established multiple conspiracies. Here, as in *Berger* and *Kotteakos*, the defendant argued on appeal that that variance was fatal. See Pet. C.A. Br. 14. As the court of appeals correctly noted, however, "[t]he true inquiry" (*Berger*, 295 U.S. at 82) was "whether this variance prejudiced [petitioner's] substantial rights" (Pet. App. 10a). And because this case resembles *Berger* far more than it resembles *Kotteakos*, the court of appeals was correct in concluding that petitioner's substantial rights were not prejudiced by the variance between the indictment and the proof.

2. Petitioner errs in contending (Pet. 16-19) that the Eleventh Circuit's decision in this case conflicts with this Court's decision in *Dunn* v. *United States*, 442 U.S. 100 (1979), and the First Circuit's decision in *Cola* v. *Reardon*, 787 F.2d 681, cert. denied, 479 U.S. 930 (1986).

In *Dunn*, the defendant was indicted under 18 U.S.C. 1623, which prohibits false declarations under oath "in any proceeding before or ancillary to any court or grand jury of the United States." See *Dunn*, 442 U.S. at 101-104. The indictment charged that Dunn's testimony before a grand jury was inconsistent with his later statements during an interview with a defense attorney on September 30, 1976. *Id.* at 103. The evidence at trial focused on the "charged inconsistency between [Dunn's] statements in the September 30 interview and his grand jury testimony." *Id.* at 106. The court of appeals, however, held that the statute under which Dunn was charged did not apply to Dunn's statements during the September 30 interview, because the interview was not a "proceeding ancillary" to the grand jury investigation. See *id.* at 104. The court of appeals nonetheless affirmed

Dunn's conviction based on his adoption of those statements in testimony at a court proceeding on October 21, 1976. See *id.* at 104-105. "[T]he Court of Appeals construed this discrepancy as a nonprejudicial variance between the indictment and proof at trial." *Id.* at 105.

This Court reversed. It "discern[ed] no * * * variance" between the indictment and the proof at trial. *Dunn*, 442 U.S. at 106. Instead, the Court determined that "there was a discrepancy between the basis on which the jury rendered its verdict and that on which the Court of Appeals sustained [Dunn's] conviction." *Ibid.* The Court concluded that "[t]o uphold a conviction on a charge that was neither alleged in an indictment nor presented to a jury at trial offends the most basic notions of due process." *Ibid.*

Dunn is inapposite here. In this case, unlike in *Dunn*, the court of appeals did not uphold petitioner's conviction on the basis of charges that were not alleged in the indictment. The indictment charged petitioner with conspiracies to import and to possess with intent to distribute marijuana that encompassed both the *Dan's Plan* and the *Duke*. See Pet. App. 4a. The court of appeals determined that the proof at trial, however, established that petitioner was involved in a smaller conspiracy that involved only the *Dan's Plan*. *Id.* at 10a-11a. Thus, "the evidence adduced at trial establishe[d] facts different from those alleged in [the] indictment." *Dunn*, 442 U.S. at 105. The Court in *Dunn* made clear that such a variance should be analyzed under *Berger* and *Kotteakos*. See *ibid.*

The First Circuit's decision in *Cola* is likewise inapposite. The defendant in *Cola* was an employee of the Massachusetts Department of Revenue who was convicted in state court of violating state conflict-of-

interest laws by participating in two loans to a delinquent taxpayer. The state appeals court upheld his conviction based not on his participation in the loans but, instead, on his appearance at a bankruptcy proceeding involving the taxpayer. See *Cola*, 787 F.2d at 691-693. Thus, *Cola*, like *Dunn* and unlike the present case, involved a "variance[] between the appellate theory [of guilt] and the proof at trial." *Id.* at 701. The First Circuit's reliance on *Dunn* to grant habeas corpus relief in *Cola* therefore does not conflict with the decision below.

Other First Circuit decisions confirm that there is no conflict between that court and the Eleventh Circuit with respect to the question presented here. For example, in *United States* v. *Glenn*, 828 F.2d 855, 858-861 (1987) (Breyer, J.), the First Circuit stated that it "approach[es] th[e] classical 'single/multiple' conspiracy problem" by applying the "well-established point[]" that "a defendant cannot upset a conviction by showing that the government proved understandings or agreements different from those charged unless the 'variance' between the evidence and the charges prejudiced the defendant, unless it '"affect[ed] the substantial rights" of the accused.'" *Glenn*, 828 F.2d at 857-858 (quoting *Berger*, 295 U.S. at 82, and citing *Kotteakos*, 328 U.S. at 758-760); accord *United States* v. *Sutherland*, 929 F.2d 765, 772-774 (1st Cir.), cert. denied, 112 S. Ct. 83 (1991). That is the same approach that the Eleventh Circuit took here.[3]

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[3] The decision below is also consistent with decisions in other circuits. See, *e.g.*, *United States* v. *Rosnow*, 977 F.2d 399, 405-408 (8th Cir. 1992) (per curiam), cert. denied, 113 S. Ct. 1596 (1993); *United States* v. *Richerson*, 833 F.2d 1147, 1154-1156 (5th Cir. 1987); see also *United States* v. *Caporale*, 806 F.2d 1487, 1500-1501

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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(11th Cir. 1986), cert. denied, 482 U.S. 917 & 483 U.S. 1021 (1987); cf. *United States* v. *Eubanks*, 591 F.2d 513, 518 (9th Cir. 1979) (per curiam).